Supreme Court U.S.
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NO. ____

In the Supreme Court of the United States

May Term 2001

C. DELORES TUCKER and WILLIAM TUCKER, her husband,

Petitioners

vs.

RICHARD FISCHBEIN; TIME, INC.; BELINDA LUSCOMBE; NEWSWEEK MAGAZINE, and JOHNNIE ROBERTS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Did the Trial and Third Circuit Courts give due deference to Your Court's holdings in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); the Pennsylvania Supreme Court in *Ertel v. The Patriot-News Co.*, 544 Pa. 93, 674 A.2d 1038 (1996) and *Curran v. Philadelphia Newspapers, Inc.*, 497 Pa. 163, 439 A.2d 652 (1981); its own opinion in *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988) and the Superior Court in *Tucker v. Philadelphia Daily News, et al.*, 757 A.2d 938 (Pa. Super. 2000); *Merriweather v. Philadelphia Newspapers, Inc.*, 453 Pa. Super. 464, 684 A.2d 137, 141 (1996); and *Savitsky v. Shenandoah Valley Pub. Corp.*, 389 Pa. Super. 176, 566 A.2d 901, 903 (1989)?

II. In the framework of a summary judgment motion, does the evidence suffice to show that Time and/or Newsweek acted with the requisite knowledge of falsity or reckless disregard as to the truth or falsity of the defamatory publication (847 F.2d 1069 (3d Cir. 1988) at 1089)?

III. Is it proper for a trial judge or an appellate court, at the summary judgment stage in a libel case, to disregard the usual summary judgment standard of review and instead to pick and choose, weigh and balance the alternative versions of the facts and to conclude from *one sentence* in a 447-page deposition that Plaintiffs will be unable *at trial* to sustain their clear and convincing burden of proving malice?

IV. What does a public figure have to do in the new millennium to withstand a summary judgment libel malice motion by the media?

V. Has Your Court and should Your Court address the inherent conflict between the First and Seventh Amendment in public person libel cases?

VI. In light of a burden of proof that is so harsh that 70% of libel cases brought against the press (where the *Sullivan* rules apply) end with Defendants' Motion for Summary Judgment and of those that go to judgment only an estimated 5-10% are upheld? Is it time to revisit *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny in the context of the current status of public persons and the media?

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RULE:

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Petition

IN THE SUPREME COURT OF THE UNITED STATES

C. DELORES TUCKER and
WILLIAM TUCKER, her husband,

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v.

TIME, INC.; BELINDA LUSCOMBE;
NEWSWEEK MAGAZINE, and JOHNNIE ROBERTS,

Respondents,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

Reference is made to the February 14, 2001, Order of the United States Court of Appeals for the Third Circuit denying the petition for rehearing *en banc* (App. 1a) and the Third Circuit's Opinion (App. 3a) and Order (App. 32a) of January 9, 2001, addressing the substantive issues. Reference is further made to the Order and Opinion of the United States District Court for the Eastern District of Pennsylvania granting summary judgment to all Defendants dated February 9, 1999 (App. 33a—opinion, 46a—order).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing *En Banc* by C. DeLores Tucker and William Tucker, her husband, was entered on January 9, 2001, and certified on February 22, 2001. Jurisdiction in this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This diversity defamation case arises under libel theories of the common law and the First, Seventh, and Fourteenth Amendments to the United States Constitution incorporated by Your Court into the common law of libel in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The relevant Federal statutes in this case include 28 United States Code §§1291 and 1332 concerning final decisions of district courts and the requirements for diversity of citizenship jurisdiction. The relevant Federal Rules in this case include Federal Rule of Civil Procedure 56(c), concerning a motion for summary judgment.

STATEMENT OF THE CASE

On July 21, 1997, C. DeLores Tucker, Chair of the non-profit National Political Congress of Black Women, Inc., former Secretary of State of the Commonwealth of Pennsylvania, and former Chair of the Democratic National Committee Black Caucus and National Board of the NAACP, and her husband filed a civil diversity lawsuit in the Eastern District of Pennsylvania against *twelve Defendants, including the Estate of Tupac Shakur* (App. 48a).

The lawsuit was *particularly* targeted at gangsta rap *marketers* Interscope and Death Row, and their principals for their 1995 SLAPP lawsuits (App. 63a, 78a), a Death Row two-page elimination ad which appeared in a rap magazine (App. 101a-103a), years of smut investigations, eleven days of repetitive depositions, *and* Tupac Shakur's All Eyez On Me's profane and defamatory lyrics accusing Mrs. Tucker of being a mother f—er and a traitor to her people.

Plaintiffs contended in the original Tucker I Complaint that, in *various* ways *including* the SLAPP lawsuits, the Death Row elimination ad, the smut investigations, eleven days of repetitive depositions, and Shakur's profane and defamatory lyrics, *Mrs. Tucker* sustained damages, including *severe emotional distress* (PAR 43), being held up as an object of scorn to more than 5,000,000 people [5,000,000 discs were sold], including children of Philadelphia and elsewhere (PAR 44), *defamation of character and reputation* (PARS 45, 46), *past and future medical expenses, mental pain and suffering, inconvenience and loss of life's pleasures, fears for her life, loss of personal freedom to travel freely when and where she desires* (PARS 47, 48), *great humiliation and embarrassment* (PAR 49). The Plaintiffs also sought punitive damages (Paragraph 61).

There was a boilerplate consortium count for Mr. Tucker:

> 50. Plaintiff's *husband*, William Tucker has as a result of his wife's injuries, suffered a loss of advice, companionship and consortium. (emphasis supplied)

On July 31, 1997, the Tuckers issued a News Release (App. 104a)[1] which clearly stated that the main focus of the Plaintiffs' July 21, 1997, Complaint was on the *"gangstas in the suites."*

> Dr. C. DeLores Tucker Files $ Multi-Million Suit *Against Record Producers* of Gangsta Rap Filth. (emphasis supplied)

The News Release acknowledged that Mrs. Tucker had received death threats and that she was not unmindful of the risk to her life in her filing of the Tucker I action. The News Release echoed the Complaint's allegations of hours of depositions, surveillance and intimidation, emotional stress, death threats, reasonable fear for her life, and inability to travel freely without fear. Again, there was no mention of sex. Finally, the News Release stressed that if she should win the suit:

> ... I will use the money to help create a healthy and vigorous climate in which our rap, hip hop and other artists can flourish and grow in healthy, productive ways and not be enslaved to this greed-driven, race driven, porno driven, grossly sexist lyrical filth that particularly defames Black women, promotes drug use, violence and panders pornography to our children.

As a result of the Tuckers' News Release, Defendant co-administrator Attorney Fischbein, whose law firm represented the Shakur Estate was contacted by the news media. Mr. Fischbein was quoted in the *Los Angeles Times*, August 1, 1997: "[I]t's hard for me to conceive how these lyrics could destroy her sex life ... [b]ut we can only wait for the proof to be revealed in court." (App. 108a) From an Associated Press wire origination, more than 60 newspapers, many of whom were owned by large media corporations acted quickly to publish articles that asserted that Mrs. Tucker sought $10,000,000 *because lewd lyrics destroyed her sex life, e.g., New York Daily News*, August 5, 1997; *USA Today*, August 4, 1997; and *The Baltimore Sun*, August 2, 1997 (App. 110a, App. 113a, App. 114a).

---

[1] Discovery in this case was combined with *Tucker v. MTS, et al.*, No. 97-CV-4717, another case where the Eastern District also granted summary judgment, the Third Circuit affirmed, 229 F.3d 1139 (3d Cir. 2000), and Your Court denied certiorari, 121 S. Ct. 776 (2001).

Approximately a dozen gave a truthful factual account of the Tucker I Complaint, *e.g.*, *The Washington Post*, August 2, 1997 and *Jet*, September 1, 1997 (App. 116a, App. 118a).

Mrs. Tucker was hospitalized at the time of the News Release. Mr. Tucker, in recorded interviews, asserted that the media was distorting their Complaint against the gangsta record companies by focusing on sex. *See*, August 5, 1997, *The Philadelphia Tribune* article: "Tucker: Media distorts lawsuit." (App. 120a) *Also see*, *Philadelphia Daily News*, August 6, 1997 (App. 121a). *Also*, the August 11, 1997, "Music News of the World" article (App. 123a).

From the beginning, Plaintiffs' counsel unsuccessfully attempted to persuade the press that the Tucker Complaint had nothing to do with sex. *See*, *Philadelphia Daily News* article, August 2, 1997 (App. 127a-129a). *Also see:*

> *Media Has*
> *C. DeLores Tuckered*
>
> After filing a $10 *million* defamation lawsuit against Time Warner Records and the estate of murdered rap artist *Tupac Shakur*, anti-rap crusader *C. DeLores Tucker* is *now complaining that the media is out to distort the facts of the lawsuit*. Claiming that clever rhymes in Shakur's *"All Eyez on Me"* release such as "Delores Tucker, you're a mother_____" caused her "great humiliation, mental pain and suffering," Tucker included her husband, William, in the suit, claiming that he had suffered *"a loss of advice, companionship and consortium."* Although the *Inquirer* didn't even cover the filing of the suit, the *Daily News* trumpeted on its August 2 front page, *"C. DeLores Tucker Claims CD Gave Her A Dirty Rap: Suit vs. Shakur estate says "vile" lyrics ruined her rep and her sex life."* Daily News Managing Editor *Brian Toolan* defends the paper's treatment of the story, saying "it's generally understood that's what loss of consortium is supposed to mean in the law." *But Tucker's attorney, Richard C. Angino disputes this, stating that the phrase [loss of consortium] is a standard addition to lawsuits of this type and refers to all aspects of the marital relation-*

> *ship, not necessarily sex. "This is why people sometimes get so upset with the media," says Angino. One disinterested personal injury attorney who wished not to be named agrees with Angino ...*

Philadelphia Weekly, August 13, 1997 (App. 130a-131a). (Emphasis supplied and in original.)

The *Philadelphia Weekly* article was published one week before Tuckers' counsel spoke to Johnnie Roberts, Defendant [in Tucker II] reporter for Newsweek, *on August 20, 1997*. In a 15 minute interview, Tuckers' attorney attempted to persuade Roberts that, although a claim for loss of "consortium" *can* include the element of sex, it usually doesn't, that *it didn't in this particular case*, that the main focus of the lawsuit was the gangstas in the suites, that the media was mischaracterizing the Tucker I Complaint, that Fishbein as the administrator and attorney for the Shakur Estate was attempting to get his own spin out to the public. *No matter what he said*, Tuckers' attorney was convinced that Roberts had a story he wanted to publish and was going to publish.

Roberts made notes of the 15 minute conversation (App. 132a-133a). The Tuckers' attorney dictated a memo (App. 144a). Roberts was deposed for 4.75 hours and 239 pages. Tuckers' attorney was deposed for over 9 hours and 447 pages. Roberts admitted in his deposition that Fischbein's press agent suggested the story, supplied the material, including the Tucker I Complaint and his only basis for his sexual spin was that the word "consortium" *can* include sex (App. 306a).

Despite Plaintiffs' and their attorney's protestations to the contrary and the absence of the word sex in any of Mrs. Tucker's claims, Johnnie Roberts and Newsweek published "Grabbing At A Dead Star."

> *She* [Mrs. Tucker] and *her* husband claim that a lyrical attack by Tupac iced *their* sex life.

• • •

> Among other things, *she* [Mrs. Tucker] asserts that she feared for her life, had been humiliated *and can no longer have sex with her husband.* (emphasis supplied)

(App. 383a)

The Newsweek article treated Mr. and Mrs. Tucker as pirates trying to loot the Tupac Estate, sex pots attempting to claim $10 million for sex lives that had been allegedly destroyed by Shakur's lewd lyrics. Mr. and Mrs. Tucker were embarrassed and humiliated and gravely disappointed that they and their attorney were unable to persuade respected magazines such as Newsweek from pandering to its millions of worldwide readers with false and malicious gossip.

Approximately one month after filing the initial Complaint and after talking to Newsweeks reporters, on August 27, 1997, Plaintiffs' counsel filed an Amended Complaint in Tucker I which specifically stated that Mr. Fischbein "has continued to defame and harass plaintiff by holding her up in a false light" and by making "false and misleading statements regarding the claim herein."

> 45. Defendant Co-administrator of the Estate of Tupac Shakur [Fishbein] has continued to defame and harass plaintiff by holding her up in a false light even after the complaint in this matter was filed on June [July] 21, 1997.
>
> 46. Defendant Fishbein made false and misleading statements regarding the claim herein, through published statements that C. Delores Tucker filed suit *because of a "loss of her sex life." This statement was untrue, and Defendant Attorney Fishbein should have known it was untrue.* (emphasis supplied)

(App. 391a-392a)

Discovery produced Time's "The Library" (App. 401a) which revealed that Defendant Luscombe prepared her story with a preconceived theme—"Sex" and "Tucker"—plugged those two words into her computer, and created her story by taking bits of previously published articles, including Newsweek's "Grabbing At A Dead Star." She felt free to choose, disregard, or change words and

sentences from her "source" articles to emphasize the destroyed sex angle. She totally ignored articles that accurately described the lawsuit. Under the guise of literary license, she created the facts and published them as "news."

The Time "Shakur Booty" article (App. 443a) refers to litigation against the Tupac Shakur Estate as a new growth industry, references a number of frivolous cases against Shakur's Estate and concludes, "The prize for the most bizarre suit, however, goes to anti-rap warrior C. DeLores Tucker, *who claims* that lewd remarks made about her on Shakur's album *All Eyez On Me* caused her so much distress *that she and her husband have not been able to have sex.*" (emphasis supplied) Time's reporter justified her article by referencing other newspaper and magazine articles and her discussion with Mr. Fischbein.

On October 1, 1997, the Tuckers filed a Complaint against Fischbein, Time, Newsweek and their reporters asserting that they uttered or published defamatory comments about the Tuckers at a time when they knew or recklessly disregarded the truth or falsity of their utterances.

Fischbein, Time and Newsweek were successful in obtaining summary judgment as to non-defamatory content and absence of malice in the various newspaper and magazine articles. The Third Circuit reversed as to defamatory content as to all three defendants but affirmed as to the lack of malice with respect to Newsweek and Time (App. 3a).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Third Circuit Panel Erred When It Affirmed The Grant Of Summary Judgment Against Newsweek By Relying Upon One Sentence Out Of Context From A 15-Minute Interview In A 447-Page Deposition To Conclude That The Tuckers Could Not Establish The Clear And Convincing Standard For Recklessness

As noted in the Factual Background, Newsweek's reporter on August 20, 1997, interviewed Plaintiffs' counsel with respect to an article that he planned to publish with respect to the Tupac Shakur Estate. Newsweek's reporter and Tuckers' counsel were deposed for two days. There are hundreds of pages of deposition testimony as well as Newsweek's reporter's notes and Tuckers' attorney's memorandum of that 15-minute conversation (App. 147a, 444a, 132a, 144a).

Disregarding these hundreds of pages of memoranda and deposition testimony pertaining to the Angino/Roberts 15-minute conversation, the Third Circuit Panel references one sentence of only two lines and then references it out of context to conclude that Plaintiff will be unable at trial to establish the clear and convincing standard for recklessness against Newsweek.

The panel starts with Plaintiffs' counsel's assertion in his deposition testimony:

> "consortium can mean, in some cases, sex. I said most of the time it doesn't, and it doesn't in this case."

(App. 516a-517a) The actual context is:

> A. I said do you have a copy of the Complaint. He says I do. I said would you turn to paragraph 50. I—I specifically said would you turn to paragraph 50. Would you read what's in paragraph 50. I say how many paragraphs are there in this Complaint. My recollection is 66 paragraphs. I said, you guys,

> and I was lumping him in with every other reporter, and I was frustrated by this time, because you're talking to people, you're trying to tell that this thing has nothing to do about sex, but they want to write about sex. I mean, there was no question in my mind as I talked to him, I said read those words. *I said consortium can mean, in some cases, sex. I said most of the time it doesn't, and it doesn't in this case*. And I'm looking at every one of you, when I had that conversation, I knew before it was ever going to be published that it was going to talk about sex. I could—I walked out of my office that day, and I don't remember who it was, but I said I just got off the phone with this guy from Newsweek. And I said it's like talking to the wall. No matter what I told him about this thing not involving sex, he wants to write about sex, and I said he's going to write about sex. (emphasis supplied)

The Panel goes on, however, to conclude that the Tuckers cannot proceed to trial because their attorney made another statement in another part of the deposition:

> Other statements in Angino's deposition severely weaken the Tuckers' position, however, and make it impossible for them to satisfy the clear and convincing standard. (emphasis supplied)

Slip. op. at 14 (App. 16a).

Although the Panel states that other statements make it impossible for the Tuckers to satisfy the clear and convincing standard, the Panel references only one statement: "I'm under oath, so I cannot say to you that I said specifically, this case does not involve sex" and references it out of context.

> A. My best recollection is that I told him that virtually all cases that I get involved in have consortium counts. Consortium counts basically—and I—I used examples, I really did. I told him the things you asked me, they can mean simple things like a wife or a husband being irritable, or the fact that, you know, they're not as nice as they used to be, or the fact that someone no longer cuts the grass for you [sic takes out the grass] or the garbage for you or does these things. I said only

> in the rarest of cases would you have a count that actually involves sex. *I'm under oath, so I cannot say to you that I said specifically, this case does not involve sex. But my recollection was everything I said the same thing.* You know— (emphasis supplied)

(App. 525a-526a)

The Panel fails to include the very next sentence that follows the one sentence relied upon by the Panel: "But my recollection was everything I said the same thing."

Your Court would rightfully castigate an advocate who did what the Panel did in this case—take one sentence out of context, omit the very next sentence, and fail to reference *The Philadelphia Weekly* article, the 15-minute conversation, the 447-page deposition, Angino's December 11, 1997 Memorandum, and Roberts' notes and deposition. It is also inappropriate for the Panel to assert that there were *other statements* when in reality there were none.

Angino's discussion of consortium starts at page 94 of his deposition (App. 445a) It continues *for over 100 pages* to 217 (App. 568a). The specifics of Angino's interview by Roberts commences on page 142 (App. 493a). On page 162 (App. 513a) Angino said:

> A. I can assure you, that Mr. Roberts came into our conversation with a story that he already wanted to write. And no matter what I said—no matter what I said, he was still going to write that same story. And I'm looking you right now in the eye, because when I was done with that conversation, I knew he wasn't going to do or say what I was telling him. I mean, you've talked to people and you know you've talked to them, and you know you've explained the thing, and you know they are going to go and do something different than what you said. And that's— we used the word lie. I don't think when he testified in his deposition that he was lying. But I can assure you that on August the 20th, he wasn't going to give the appropriate account of this story that I gave him. I can assure you of that.

(App. 513a-514a)

• • •

A. No. Johnnie Roberts wanted to write about sex. And if it doesn't involve sex, it's not worth writing about. ...

• • •

A. He struck me that he was going to do it here. I—I didn't know Johnnie Roberts at the time.

• • •

Q. ... Do you think it's possible that you did not use the exact words in that conversation to Mr. Roberts, that the claim in this particular case doesn't have anything to do with sex, that you meant that, that you maybe even thought that you said those exact words or something like those words, but that maybe you didn't actually say it. Isn't that—is that possible?

A. The words I used, the tenor of what I said, was this is not a case where lewd lyrics had any effect upon Mrs. Tucker's sex life. The language was not intended for that purpose. And I'm telling you, and I am a person who will never, ever say anything under oath or otherwise, that I don't firmly believe, I knew he wasn't going to listen to me. And you can ask your questions and try to do what you do and just as you did—

Q. Well, let me just ask you this question then, Mr. Angino. Do you recall what words you used—what precise words you used, to convey to Mr. Roberts, the idea that this case did not involve sex at all?

• • •

A. I was convinced that he was ignoring it all and was going to write—because he—he kept being defensive. But can't it—you know, can't you interpret consortium this way. It was like can't you interpret—I mean, can't you interpret the—something a certain way.

• • •

Q. And—and that—that statement, that—that—that a claim of damage to sex life was just a small part of the case, is an acknowledgment that it's a part of the case, right?

> A. Let us—let us even concede for your purpose, that if a media could interpret it as a small part of a case, you are not permitted under libel laws, to say that it has destroyed their sexual relations. You are not permitted to distort the Complaint in such a way. You are not permitted to do what was done here, which is libel.

(App. 522a-530a)

The existence of malice is almost always a fact question and not a question of how to be decided on summary judgment. *Schwartz v. American Medical Association*, 23 F. Supp.2d 1271 (D.N.M. 1998); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988); *Tucker, et al. v. Philadelphia Daily News*, 757 A.2d 938 (Pa. Super. 2000).

II. The Panel Fails To Mention, Let Alone Distinguish, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988); *Tucker v. Philadelphia Daily News, et al.*, 757 A.2d 938 (Pa. Super. 2000); *Merriweather v. Philadelphia Newspapers, Inc.*, 453 Pa. Super. 464, 684 A.2d 137 (1996); *Savitsky v. Shenandoah Valley Pub. Corp.*, 389 Pa. Super. 176, 566 A.2d 901, 903 (1989)

Tuckers' appellate brief relied heavily upon *Masson*, *Schiavone*, *Merriweather*, and *Savitsky*, *supra*, to reverse the trial court's grant of summary judgment.

> The constitutional question we must consider here is whether, in the framework of a summary judgment motion, the evidence suffices to show that respondents acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. This inquiry in turn requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability. We must consider whether the

> requisite falsity inheres in the attribution of words to the petitioner which he did not speak.

Masson, 501 U.S. at 513.

The Supreme Court in *Masson* proceeded point by point through alleged *mischaracterization* as to what was allegedly said and concluded time and time again:

> This difference is material, a jury might find it defamatory, and, for the reasons we have given, *there is evidence* to support a finding of deliberate or reckless falsification. (emphasis supplied)

Masson, 501 U.S. at 525.

The Court's *attention* is directed to the Superior Court's opinion in *Tucker v. Philadelphia News, et al.*, 757 A.2d 938 (Pa. Super. 2000) which addresses the identical issues presented to the Third Circuit. The Court's attention is also directed to the opinion in *Merriweather v. Philadelphia Newspapers, Inc.*, 453 Pa. Super. 464, 684 A.2d 137, 141 (1996):

> [8, 9] For the following reasons, we find that Appellant has raised a genuine issue of material fact, sufficient to survive Appellees' motion for summary judgment. Appellant alleges that Appellees fabricated an accusation that he "fixed" the Massey trial, "(1) which accusation is neither in the criminal charge, (2) nor a reasonable interpretation of the criminal charge, (3) nor in any of the materials on which the newspaper defendants relied in writing the article, (4) but is instead contradicted by the source materials[.]" Appellant's Brief, at p. 10. To support these allegations, Appellant argues that the inaccuracy of the headline, the implications of the headline and article together, as well as the Appellees' failure to identify the headline writer, raises a genuine issue of material fact as to whether Appellees published the article with actual malice. We agree.

Merriweather, *supra* at 472-473, 684 A.2d at 140-141. *Also see*, *Savitsky v. Shenandoah Valley Publishing Corp.*, 389 Pa. Super. 176, 566 A.2d 901 (1989):

> Viewed in light of these decisions, the facts of the case sub judice lead this Court inexorably to the conclusion the actions of the newspaper and O'Brien exhibited recklessness such as a jury might reasonably find to constitute actual malice.

Savitsky, supra at 180, 566 A.2d at 903.

The Third Circuit's opinion in *Schiavone* summarizes the applicable law and reaches the same conclusion as Your Court in *Masson* and the Superior Court in *Tucker*, *Merriweather*, and *Savitsky*. *See*, *"VII. Malice", 847 F.2d 1069, at 1089-1093. Also see*, the Supreme Court of Pennsylvania's opinion in *Ertel v. The Patriot-News Co.*, 544 Pa. 93, 99, 674 A.2d 1038, 1041 (1996) and *Curran v. Philadelphia Newspapers, Inc.*, 497 Pa. 163, 439 A.2d 652 (1981). *Also see*, *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997); *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999); *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163 (2nd Cir. 2000); *Church of Scientology International v. Behar*, 238 F.3d 168 (2nd Cir. (N.Y.) 2001); *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265 (7th Cir. 1996); *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998); *Johnson v. The Black Chronicle, Inc., et al.*, 964 P.2d 924 (Okla. Civ. App. Div. 4 1998); *Beal v. Bangor Pub. Co.*, 714 A.2d 805 (S. Ct. Maine 1998); *Snitowsky v. NBC Subsidiary, Inc.*, 297 Ill.App.3d 304, 696 N.E.2d 761 (1998); *Abdelsayed v. Narumanchi*, 39 Conn.App. 778, 668 A.2d 378 (1995); *Hinerman v. The Daily Gazette Co., Inc.*, 188 W. Va. 157, 423 S.E.2d 560 (1992); *McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 729 N.E.2d 364 (2000); *Gaylord Broadcasting Co. v. Francis*, 7 S.W.3d 279 (Tex. App. 1999); *Bunton v. Bentley*, 1999 WL 967686 (Tex. App. 1999) and *Burnett v. National Enquirer, Inc.*, 144 Cal.App.3d 991, 193 Cal. Rptr. 206 (1983).

Although no case is entirely precedential, the facts and circumstances of *Masson* are as close as one could ever expect to find. Mr. Masson alleged that *The New Yorker* magazine mischaracterized what he said. The Tuckers alleged that *Time* and *Newsweek* mischaracterized their 1997 Complaint, News Release and what Angino said to Roberts. Neither Mr. or Mrs. Tucker nor their attorney said that

lewd lyrics destroyed the Tuckers' lives or that they were not able to have sex and consortium cannot be logically equated with destroyed sex life.

III. The Panel Must, But Did Not, Follow The Law Of Pennsylvania In This Diversity Action

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In the companion case of *Tucker v. Philadelphia Daily News*, 757 A.2d 938 (Pa. Super. 2000), the Superior Court reversed the trial court's grant of Preliminary Objections. The Superior Court denied Philadelphia Daily News' request for reconsideration. Although a Petition for Allowance of Appeal has been filed to the Pennsylvania Supreme Court, the Third Circuit was required to follow the Superior Court in this diversity action.

IV. Although The Definition Of Consortium Can Include Sex, A Jury May Find That Newsweek And Time Published Stories With A Reckless Disregard For The Truth By Reporting A Claim For Loss Of Sex Was Made By *Mrs.* Tucker And Going Further To Allege That *Mrs.* Tucker Wanted $10 Million Because *She* Could No Longer Have Sex With Her Husband Or That "Shakur's Album *All Eyez On Me* Caused Her [*Mrs.* Tucker] So Much Distress That *She* And Her Husband Have Not Been Able To Have Sex"

Although damage to one's sexual relations with one's spouse is included in the definition of "consortium," a "consortium" claim does not permit one to conclude that a claim for damaged sex life has been made. Otherwise, the media could defame everyone who broke a toe, had a whiplash, or a back sprain if there was a consortium claim, *e.g.*, Judge Alioto has not been able to have sex since he broke his toe in a rear-end collision. This example is actually less bizarre than *Time's* and *Newsweek's* reporting as news that lewd lyrics destroyed Mrs. Tucker's sex life.

18
Reasons for Allowance of the Writ

Every first-year student who took a Philosophy I course studied basic logic, including epistemology, philosophical logic, methodology, etc., *e.g.*, Grayling, *Philosophy I* (Oxford University Press 1999, 2000).

Elementary logic precludes taking a word like consortium that *may* include loss of sex, *assume that it does* include sex, *assume the loss is total*, *transpose* the husband's claim into the wife's claim, and *publish as "news"* Mrs. Tucker filed a suit for $10 million *because lewd lyrics destroyed her sex life*. At some point, the writer is recklessly *creating news* rather than responsibly or even negligently reporting facts, and is in fact recklessly reporting a manufactured, exaggerated, false product as news.

If someone says that something is bizarre or "most bizarre," as the Time news reporter did, saying that the moon is made of green cheese or saying that there are pink elephants or lewd lyrics destroyed someone's sex life, the reporter can be found by a jury to be reckless for publishing such bizarre facts as "news" without double checking or triple checking particularly if someone's reputation is at stake. Although the definition of human beings includes men and women, *Newsweek* and *Time* would be reckless by asserting as an historical fact that Socrates was a woman because he is a human being, women are included in the definition of human beings, and Fischbein told them that Socrates was a woman. Just the use of the word "bizarre" or "most bizarre" creates a factual issue as to recklessness.

By the time Time and Newsweek were publishing their articles, the Tucker Complaint was not "hot news." Fischbein was not an unbiased source, the story that two seventy-year-old people one who was leading a movement against sex in lyrics claimed that their sex life was destroyed by lewd lyrics was truly bizarre. The Tucker I Complaint did not use the word sex. Time and Newsweek had attorneys on staff who were consulted by the reporters, but Time and Newsweek on the basis of attorney/client privilege refused to permit depositions of their in-house corporate attorneys. Time and Newsweek reporters had preconceived stories to tell and ignored

what didn't fit. Time's reporter never contacted Tuckers' attorney and Newsweek's attorney ignored what he said.

Plaintiffs have engaged as experts two highly credentialed and respected journalists and teachers who have devoted their lifetimes to living, writing, and teaching the ethics of journalism. *See*, Wesley G. Pippert's CV and reports of September 16 and 29, 1998 (App. 411a-416a) and Deni Elliott's CV and reports of September 16, 1998, and October 4, 1998 (App. 417a- 432a).

Both of these experts were prepared to testify that Defendant Time Inc. and its editorial and legal staff published the "Shakur Booty" September 22, 1997, article and Newsweek's article "Grabbing At A Dead Star," September 1, 1997, with actual malice as interpreted by the Supreme Court and other courts by discussing and opining on Time's/Luscombe's, Newsweek's/Roberts' extreme failure to conform to journalistic ethics/standards.

If these facts cannot withstand a Motion for Summary Judgment, it is hard to conceive what facts would.

V. The Panel Should Have Considered That The Media In The 1990s Is Different Than The Media In 1776 When The First Amendment First Established Freedom Of Speech And Freedom Of The Press And Even Different Than The 1960s And The 1970s, The Era Of The Cases Referenced By The Third Circuit Panel

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Today there are a few media giants that control what we see and read. Time Inc., a division of Time Warner, which just merged with AOL, is one of these giants. Time Warner was served with an Amended Complaint that said that Fischbein was lying. Time's reporter said she never received notice. Discovery was denied Plaintiffs. Plaintiffs' attorney could not depose Time's in-house attorneys who had responsibilities to review all articles and advise as to possible libelous content.

Public figures are at the mercy of mega media, and that media has the power to destroy public figures by mischaracterizations of fact that constitute nothing but mega media's fictional creation to sell advertising by filling the airways with sex, sleaze, and celebrities.

There are a number of publications, including Edwin Diamond, *The Media Show* (The MIT Press 1991) and David J. Krajicek, *Scooped* (Columbia Univ. Press 1998) that emphasize how newspapers and magazines, radio, television, cable, etc. have over the last ten to twenty years become mega corporations that attempt to sell *sex, sleaze, and celebrities*. Although the media purport to report "news," they fictionalize the facts for the purpose of selling their newspapers, magazines, radio, television, and books. One cannot turn on the TV and/or pick up a magazine or newspaper without reading stories about sex, sleaze and celebrities. Carol Burnett and Clint Eastwood, as well as many other celebrities have had to sue the media for false reporting. *See*, *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997) and *Burnett v. National Enquirer, Inc.*, 144 Cal.App.3d 991, 193 Cal. Rptr. 206 (1983). Our TV shows are sex and the law, sex and medicine, sex and violence, sex and sex. Although sex, sleaze and celebrities sell, one cannot deliberately change facts and call fiction "news" and not permit a jury to find "malice." Are Time and Newsweek to be held to a lower standard than the National Enquirer?

Plaintiffs' Complaint involved celebrities, Mrs. Tucker and Tupac Shakur. It needed sex and sleaze, however, to sell. Defendants provided the sex and sleaze even though the Complaint and the News Release did not. Certainly a jury could find that their actions were at least reckless if not downright false.

The 1990s and the year 2000 have witnessed a number of articles critical of and questioning the appropriateness of *Sullivan* and its progeny in the changed world of the 1990s and the new millennium. Jonathan Garret Erwin, *Can Deterrence Play A Positive Role In Defamation Law?*, 19 Rev. Litigation 675 (Univ. Texas Law School Publ. Summer 2000); Michael W. Richards, *Tort Vision for the New Millennium: Strengthening News Industry Standards As A*

Defense Tool In Law Suits Over Newsgathering Techniques; 10 Fordham Intellectual Property Media and Entertainment L.J. 501 (Winter 2000); Marc E. Sorini, *Factual Malice: Rediscovering the Seventh Amendment In Public Person Libel Cases*, 82 Geo. L.J. 563 (1993); Edward T. Fenno, *Public Figure Libel: The Premium On Ignorance And The Race To The Bottom*, 4 S. Cal. Interdisciplinary L.J. 253 (Winter 1995); David A. Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability In Libel Actions*, 23 Univ. Arkansas, Little Rock L.R. 201 (Fall 2000).

Ideally, the law of defamation would be able to achieve two goals simultaneously. First, the law would deter the citizenry, including the press, from communicating all unprivileged, false, defamatory speech. Because perfect deterrence is impossible, the law would also provide a remedy that could cure a wounded reputation if deterrence failed to prevent harm from the outset. Second, the law would allow free speech to flourish and public debate to rage unfettered. Beneficial speech would be fully encouraged. A balance between these two goals is, essentially, what jurists have attempted to achieve with defamation laws.

A balancing of the two goals is required because an analysis will reveal that they are, in some fundamental ways, diametrically opposed. Because the two goals are in opposition, particularly with regard to deterrence and free speech, one goal must either cancel out the other, or compromises must be made between them. In *New York Times Co. v. Sullivan*, the United States Supreme Court decided that the balance of defamation law should tilt markedly towards promoting free speech and away from deterrence. Though it was ostensibly striving to protect reputation, the Sullivan Court's new constitutional regime was primarily designed to prevent the chilling of speech and to protect "uninhibited, robust, and wide-open" debate on public issues. Unfortunately, its new balancing test left injured plaintiffs without acceptable remedial protection. The Court was so concerned about preventing chilling of

speech that it created a regime that neither sufficiently deters speech nor provides vindication for those with damaged reputations. Ironically, the regime does not even fully protect legitimate speech.

Erwin, *Can Deterrence Play a Positive Role in Defamation Law?*, *supra*, pp. 676, 677.

Our current defamation law has rightfully been compared to a lottery. Like players of the lottery, libel plaintiffs almost never win, but when they do, they win big. The reason for this strange result in libel litigation is not that plaintiffs' reputations are harmed any less now than they were before Sullivan. On the contrary, in this day and age, when the public is constantly and overwhelmingly bombarded with information, it would not be far-fetched to suggest that more people are victimized by tortious speech now than ever before. The reason why libel law functions like a lottery is that, after Sullivan, even though the remedy for defamation is "largely illusory," juries are more willing than ever to award victims of defamation enormous judgments. Libel law looks even more like a lottery when empirical data is analyzed. Close to 70% of libel cases brought against the press (where the Sullivan rules apply) end with a defendant's motion for summary judgment. Of those suits that survive and go on to judgment, only an estimated 5% to 10% of those judgments are upheld. Appellate courts overturn the vast majority of judgments because of insufficient proof of malice. Those few judgments that are upheld do tend to be large, however. For example, the average total award for plaintiffs bringing defamation suits in 1992-1993 exceeded $1 million. Despite the large judgments, plaintiffs, especially those unfortunate enough to be classified as public figures, are certainly worse off than they were before the common law became engulfed by constitutional requirements. As this Note's discussion of the elements of modern defamation law has demonstrated, much of the plaintiffs' plight is by design. The summary judgment victories are, for the most

> part, the result of the Court's decision in Liberty Lobby to force public figures and private persons seeking presumed damages to provide enough evidence to prove actual malice clearly and convincingly. Plaintiffs' inability to succeed in the appellate courts can legitimately be blamed on the fact that they have the burden of proving falsity and because, as will be discussed below, most of them have to prove actually [sic] malice clearly and convincingly to recover. The Supreme Court has, in sum, cobbled together an intricate matrix of rules that makes it close to impossible for plaintiffs to recover. When there is success, it is great, but that is little comfort to the 90% that fail. That 90% may be left with a still-damaged reputation (depending on the merits of their case from the outset) and possibly crippling legal fees.

Erwin, *supra*, pp. 692-694.

> In sum, because of the changes of defamation law, plaintiffs are, for the most part, denied redress for harm to their reputations. At the same time, there is less deterrence against defamation because of plaintiffs' inability to recover. What we are left with, therefore, is a constitutional defamation law that encourages the press to defame and that does not compensate the victims of unprivileged, defamatory falsehoods.

Erwin, *supra*, pp. 695-696.

> If cynicism has infected contemporary journalists, then it appears the public has responded with cynicism of its own—apparently viewing the news media, as an institution, with a more jaundiced eye. Survey data from a leading media research think thank, [sic] The Pew Center for the People & The Press, in 1997, found the American public "more critical of press practices, less enthusiastic about the news product and less appreciative of the watchdog role played by the news media than it was a dozen years ago." Empirically, The Pew Center survey found that in 1985, a solid majority polled believes news organizations were accurate. A dozen years later, a similar majority believed they did not "get the facts straight." An even

> more solid majority believed the new media unnecessarily invaded people's lives—even when it was not in the public interest to do so. The Supreme Court's majority has paid homage to "the press as a watchdog of government activity," insofar as "the basis [sic] assumption of our political system that the press will often serve as an important restraint on government" and a "check on government abuse." But three decades since that judicial tribute, these survey date [sic] indicate that the public now sees the news media less as a watchdog and, perhaps, more as attack dog.

Richards, *Tort Vision for the New Millennium*, *supra*, pp. 501, 502.

> The protection of the right to jury trial in civil cases is a crucial freedom secured by the Seventh Amendment of the Bill of Rights. The omission of this right figured prominently in the struggle to include a Bill of Rights in the Constitution. Before the 1960s, the Seventh Amendment was one of the constitutional safeguards most aggressively enforced by the Supreme Court. However, the vitality of the Seventh Amendment is increasingly threatened by federal courts engaging in judicial factfinding. Nowhere is this trend more striking than the application of de novo review in public person libel cases.
>
> This note argues that by engaging in extensive factual review, the Supreme Court is violating the Seventh Amendment in letter and spirit, and is encouraging or even requiring lower federal courts to do so as well. The Framers of the Seventh Amendment intended to prevent judicial overreaching by the newly created federal judiciary. With this concern in mind, they set out to guarantee that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."
>
> However, since the Supreme Court's decision in *New York Times Co. v. Sullivan*, the command of the Seventh Amendment has been routinely ignored in public person libel cases. In the name of First Amendment freedom of the press, Sullivan and its progeny have made illusory the right to a lay

> jury fact finder. Today, with a reversal rate of seventy-one percent in Sullivan "actual malice" cases, it appears that the Framers' fear of judicial overreaching has come to pass. In public person libel cases, media defendants today can rely on an unelected elite to review verdicts de novo and make findings that are considerably more prodefendant than those made by juries who are representatives of the population at large.

Sorini, *Factual Malice*, *supra*, pp. 563, 564.

Present day public figure libel law is "a failure." It is a failure because it gives too much protection to grossly irresponsible publishers of false statements of fact, while providing too little protection for victims of libel, consumers of information, and publishers who carefully investigate the truth of their factual statements prior to publication.

The primary cause of this failure in the United States Supreme Court's present emphasis on the subjective beliefs of defendant publishers in the Court's "actual malice" standard. This emphasis on the publisher's subjective belief creates two problems. First, it places a "premium on ignorance," encouraging publishers not to investigate the truth of their statements before publication. Second, it assigns too low a value to the reputation of victims of libelous statements. This disincentive to investigate and undervaluation of reputation in turn encourages a "race to the bottom," in which publishers carelessly rush to print outrageous stories about public figures in an effort to "scoop" other publishers and earn money or benefits from the shock of their publications.

Since many of these poorly-substantiated publications turn out to be untrue, this "race" leads to three important harms to society. First, large numbers of innocent persons are horribly libeled with no chance at either financial compensation or a re-establishment of their reputation. Second, the marketplace of ideas becomes so diluted with factually false information that consumers of information don't know what to believe. Third, publishers who carefully investigate the truth

of their information cannot compete financially with the careless publishers of false information.

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As the cases in Part II might indicate, the Supreme Court accomplished its goal of "uninhibited, robust, and wide-open" debate by turning to the actual malice standard in *New York Times v. Sullivan*. At present, empirical evidence suggests that publishers rarely, if ever, censor themselves for "fear of large verdicts in damage suits for innocent or mere negligent misstatement," or even for "fear of the expense involved in their defense." In fact, in their recent article in the Louisiana Law Review, Professors Russell L. Weaver and Geoffrey Bennett quote one prominent news publisher as having no fear whatsoever of defamation liability.

Fenno, *Public Figure Libel*, *supra*, pp. 254, 264.

As noted in Part A, the actual malice standard falls short because it gives too much "breathing space" to publishers. In an attempt to prevent censorship of "valuable speech" (opinions, as well as true statements of fact) the actual malice standard has afforded publishers protection even when they carelessly publish false statements of fact.

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The actual malice standard's emphasis on the publisher's subjective belief of the truth or falsity of his publication in essence places a "premium on [the publisher's] ignorance."

Fenno, *supra*, p. 266.

The second failure of the actual malice standard is that it undervalues a person's interest in his reputation. As the Supreme Court said, "the legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted upon them by defamatory falsehood."

• • •

Reputation, "is not some lifeless abstraction, but the summation of all the possibilities for gainful interactions—economic, social, and political." This summation can be easily stripped away by false accusations from the media or other widely published and believed sources. These false accusations can ruin a person's career or social life.

In addition, once the false accusations are made, there is practically no turning back.

• • •

While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge.

Fenno, *supra*, p. 270.

At present, the law offers little such encouragement. Under actual malice, a reporter's good faith belief that his story is true is the only factor that the courts take into account in their imposition of liability. The fact that a public figure plaintiff proves that a publisher proceeded with a story "heedless of the consequences" to the plaintiff's reputation is irrelevant. Thus, under actual malice, a publisher need not weigh the cost of further investigation against the potential injury to the plaintiff's reputation to avoid liability. This means that the only time a public figure libel plaintiff's reputation is taken into account is in the "mark[ing] out" of the actual malice standard itself. Since the Supreme Court has created a standard which makes it so difficult for public figures to recover for defamation, it appears that the Court has ruled that the reputation of these people is worth very little indeed.

It has been argued that by running for public office or thrusting oneself into the forefront of public controversies (and thus becoming a public figure) a person assumes the risk of damage to his reputation, since he knows that his actions will

not be more frequently in the public spotlight. In his article, Is Libel Law Worth Reforming?, Professor Anderson has shown that this argument is "riddled with fallacies," three of which deserve mention here.

The first fallacy is that a person who is more frequently in the public spotlight must be left without a remedy for defamatory falsehoods. As Professor Anderson points out, "[l]ogic supports the opposite conclusion equally well: because the risk of close public scrutiny— and therefore defamation— is greater, the law should be more protective of the reputation interest."

The second fallacy is that all public figures became public figures by "thrusting" themselves into public controversies. In fact, many public figures would prefer to avoid public controversies altogether, but they cannot since their lives or careers are so interesting to the public that the public is drawn to them. Johnny Carson's wife, for instance, was held to be a public figure simply because she was married to Johnny. She did not choose to sacrifice reputation for power and influence. Rather, any power and influence she might have obtained was simply derived from her successful (or unsuccessful) marriage to Johnny.

The third fallacy stems from the fact that the assumption of risk argument is circular. "If those who seek public office or seek to influence the outcome of public controversies waive some portion of reputational protection by doing so, it is only because the law says so. It cannot explain why the law says so." As noted above, "[p]ublic figures do not choose to forego remedies for defamation. True, they may know that they are more likely to be discussed and hence to be defamed, but ... that need not weaken their claim to the law's protection."

Thus, the actual malice standard does not adequately protect the reputations of public persons, since a publisher presently does not have to weigh the cost of further investiga-

tion against the potential injury to the plaintiff's reputation to avoid liability.

Fenno, *supra*, pp. 271-272.

One major purpose of the First Amendment is to provide a "marketplace of ideas" from which people can draw in order to make decision about their lives and their government. Under the actual malice standard, however, too many false statements of fact are allowed to enter the marketplace of ideas. This is because publishers have no incentive to investigate the truth of their factual statements before publishing. In fact, as noted above, publishers often have a strong financial incentive to publish scandalous statements, whether they are true or not. These untrue statements pollute the marketplace by providing consumers with information that outwardly appears to be objectively true fact, but which in reality is just a false statement based on the publisher's unverified belief or opinion.

Fenno, *supra*, p. 273.

The publication of these false statements of fact, without corresponding labels indicating that the information is merely "opinion," "editorial," or "news analysis," injures the consumer of the information in two ways. First, he is injured when he makes some decision in his life in reliance on these false facts.

• • •

The consumer's second injury comes when he learns that the information on which he relied was false. He is injured because he no longer knows what information to take as fact and what information to receive with skepticism.

• • •

Since the consumer cannot spend the time to investigate all the statements of fact he receives to determine for himself whether they are actually true, he must be satisfied that he will never be able to obtain the true information he needs to run his life. This result injures the consumer because instead of

> re-establishing his faith in the marketplace it simply leaves him doubting everything he reads or hears.
>
> • • •
>
> Publishers who carefully investigate the truth of their statements of fact before publishing them are valuable to the marketplace of ideas because they provide information upon which consumers of information can wholeheartedly rely when deciding how best to run their lives. Present-day libel law fails to protect these publishers because it allows their competitors to gain a financial edge. This edge is gained when the competitors carelessly publish false statements of fact about public figures without being held liable for damages in defamation.

Fenno, *supra*, pp. 273-276.

VI. CONCLUSION

For all of the reasons indicated, Your Court should grant Plaintiffs' Petition.

Respectfully submitted
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PROOF OF SERVICE

I hereby certify that I, Richard C. Angino, Esquire, have this 15 day of May, 2001, served a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI upon counsel of record via postage pre-paid, first-class United States mail addressed as follows:

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